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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 638

FLORIDA EAST COAST RAILWAY CO., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

No. 639

CITY OF TAMPA, FLORIDA, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

No. 641

SOUTHERN RAILWAY SYSTEM, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA JACKSONVILLE DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the Interstate Commerce Commission moves that the judgment of the district court be affirmed.[1]

STATEMENT

This is the second time that this case has been before this Court.

The basic issue is the validity of the Interstate Commerce Commission's approval, under section 5 of the Interstate Commerce Act, of the merger of the Seaboard Air Line Railroad Company and the Atlantic Coast Line Railroad Company, subject to employee protective conditions and traffic conditions for the protection of competing railroads. The lower court initially held (242 F. Supp. 14) that the Commission's decision was fatally defective because of the failure to make findings as to "whether or not section 7 of the Clayton Act would be violated by the proposed merger" (Fla. J.S. 62a), with specific reference to the criteria of "product market and the geographic locus of competition" as developed in an-

[1] Four separate Jurisdictional Statements have been filed in this case; arguments presented in Nos. 638, 639, and 641 will be answered in this Motion to Affirm. The fourth, No. 640, *Railway Labor Executives Assn., et al.* v. *United States*, involves only the issue of the validity of the labor-protective conditions imposed by the Commission. An extension of time has been obtained for filing Motions to Affirm in No. 640, until November 14, 1966. For convenience of reference, "Fla. J.S." will be used to refer to the Jurisdictional Statement of the Florida East Coast Railway; "So. J.S." refers to that of the Southern Railway System; and "City J.S." refers to that of the City of Tampa.

titrust cases (Fla. J.S. 64a). That decision was reversed by this Court, in a *per curiam* opinion (382 U.S. 154), on the ground that "the District Court erred in its interpretation of the directions this Court set forth in *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), and *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173 (1959)." (382 U.S. at 156).

The standards to be applied were reiterated by this Court (382 U.S. at 156):

> "Although § 5(11) does not authorize the Commission to 'ignore' the antitrust laws, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80, there can be 'little doubt that the Commission is not to measure proposals for [acquisitions] by the standards of the antitrust laws.' 321 U.S. at 85-86. The problem is one of accommodation of § 5(2) and the antitrust legislation. The Commission remains obligated to 'estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the overall transportation policy.' 321 U.S., at 87."

This Court accordingly ordered the case remanded to the district court "for a full review of the administrative order and findings pursuant to the standards enunciated by this Court." (382 U.S. at 157).

Upon remand the district court, after an exhaustive consideration of the arguments of all of the vari-

ous plaintiffs, sustained the Commission's decision. In regard to the major issue—whether approval of the merger should be denied because of its anticompetitive consequences—the lower court found that "the ICC has clearly realized the danger zones in this merger and after analyzing the problem has chosen what it concludes to be more important public benefits" (Fla. J.S. 38a). The Court noted that the Commission "has focused on that phase of the transportation problem President Kennedy emphasized in his transportation message to Congress—*inter*modal competition", (Fla. J.S. 40a), and that it "reasoned that to maintain healthy railroads in the long run, it must foster competition at that level where it will have its most decisive effect" (Fla. J.S. 40a-41a). The Commission's determination that "the greatest good came from increasing competition in the Southeast as opposed to maintaining it in but a part of Florida" was deemed by the lower court to be a reasonable accommodation of the antitrust laws and the Interstate Commerce Act, as required by the prior decisions of this Court.

The lower court further upheld the traffic conditions imposed by the Commission as a product of "careful study" tailored "to fit [the Commission's] expert prediction of the future" (Fla. J.S. 43a), and found that the employee protective conditions "adequately protect the rights of employees in this situation" (Fla. J.S. 49a). In regard to the other contentions of the various plaintiffs, the lower court found that "the ICC explained its reasoning and supported

its application of that reasoning by substantial evidence." (Fla. J.S. 50a).

ARGUMENT

These appeals present no substantial legal question warranting plenary consideration by this Court. *Brotherhood of Maintenance of Way Employees* v. *United States*, 221 F. Supp. 19 (E.D. Mich. 1963), affirmed *per curiam* 375 U.S. 216. In its prior opinion in this case, this Court reaffirmed the standards by which the Commission is to determine whether, and subject to what conditions, a proposed merger is "consistent with the public interest." (382 U.S. at 156-57). The district court, after a thorough canvass of the voluminous record made before the Commission and a careful review of the Commission's report and order, has unanimously concluded that those standards were properly applied by the Commission herein. Since the evaluation of a merger in light of the statutory standards is peculiarly for "the wisdom and experience of [the] Commission, not of the courts" (*Minneapolis & St. L. R. Co.* v. *United States*, *supra*, 361 U.S. at 188; *McLean Trucking Co.* v. *United States*, *supra*, 321 U.S. at 87, and cases cited therein), there is no occasion for further hearing before this Court.

This Court has repeatedly recognized the special Congressional policy as to railroad structures and unifications. "The congressional purpose in the sweeping revision of Section 5 of the Interstate Commerce Act in 1940, enacting Section 5(2)(a) in its

present form, was to facilitate merger and consolidation in the national transportation system. * * * The very language * * * expresses clearly the desire of the Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification." *County of Marin* v. *United States*, 356 U.S. 412, 418-419 (1958).[2] The Commission accordingly is authorized to approve a proposed merger if it finds that the merger, subject to such conditions as it may impose, "will be consistent with the public interest," and by Section 5(11) the participants in such merger "shall be and they are hereby relieved from the operation of the antitrust laws."

Appellants have repeatedly attempted to convert this proceeding into an antitrust suit, ignoring the special Congressional policy as to rail unifications. The lower Court noted that (Fla. J.S. 5a) "at some point the orderly administrative process envisioned by Congress has been derailed. All too much time has been consumed in showing a violation of the antitrust laws and too little time devoted to assessing the 'public interest' as expressed in the Interstate Commerce Act." As this Court reiterated in its prior opinion in the instant case (Fla. J.S. 53a), it

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[2] There has been no relaxation of this Congressional purpose. As recently as 1962, with full knowledge of the instant and other major rail unification proposals pending before the Commission, the Congress refused to defer them even temporarily. See Hearings on S. 3097 before a Subcommittee of the Senate Committee on the Judiciary, 87th Cong., 2d Sess. (1962).

"matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria [of § 5(2)] that such a merger would be 'consistent with the public interest'."

Appellants have largely ignored one of the basic elements of the concept of the "public interest"—the results of the proposed merger in terms of service and benefits of the public. In addition to estimated savings of $20 million annually, the advantages to the public from the Seaboard-Coast Line merger were clearly established. For example, the Commission found (320 I.C.C. 160): "In the area of improved service, it can be anticipated that benefits will be derived from (1) more flexible schedules and more direct routes; (2) the elimination of interchanges and delays in transit; and (3) the simplification of transit arrangements and greater flexibility in arranging stopoff points. Reduction in shipping costs can be anticipated from the elimination of wasteful and unneeded transport facilities, the substitution of single-line rates on certain commodities, and the elimination of certain switching charges. A more adequate car supply, the availability of more specialized equipment, and more efficient utilization of equipment should result." The Commission further pointed to the fact that "the merged company will make a significant contribution to the economic and industrial development of the Southeastern States through the promotion of new industrial sites,

improvements in port terminal facilities, and in the stabilization of employment which will flow from greater financial stability of the merged company" (320 I.C.C. at 160-61). These are virtually the same types of benefits that the Commission found to warrant approval of the merger involved in *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 88, and relate to factors which affect the practical needs of the shippers and communities served by the parties to the merger.

The "public interest" standard does, of course, include a consideration of the competitive consequences of the merger, as urged by appellants, but "as a factor in determining the propriety of [railroad acquisitions] the preservation of competition among carriers, although still a value, is significant chiefly as it aids the attainment of the objectives of the national transportation policy." *Minneapolis & St. L. R. Co.* v. *United States*, *supra*, 361 U.S. at 187. Thus, the undisputed fact that the merger of the Seaboard and the Coast Line will result in an elimination of the competition heretofore existing between them in the Southeast, and in a rail monopoly in parts of Florida, is important only as an element of evaluation of "the effect of the merger on competitors and on the general competitive situation in the industry" (*McLean Trucking Co.* v. *United States*, *supra*, 321 U.S. at 87). That evaluation was made by the Commission, and its evaluation is no less meaningful because made in terms of the practical transportation situation involved instead of in the antitrust vocabulary preferred by appellants.

In line with their basic antitrust approach, appellants have further attempted to isolate intramodal rail competition from the general competitive situation in the transportation industry, treating it as a separate submarket in their analyses. But this ignores the simple economic fact that the virtual monopoly on intercity traffic once possessed by the railroads has long since disappeared, so that a meaningful appraisal of the competitive consequences of the merger can only be made in the context of "the sum of all of the competitive transportation facilities that will remain available in this broad area." (320 I.C.C. at 166). Even in the transportation of bulk commodities, generally regarded as "normally handled by rail" (320 I.C.C. at 151), motor and water competition has now manifested itself in the most meaningful way—compelling the railroads to reduce their rates to retain the traffic (320 I.C.C. at 153).

A practical, realistic evaluation of the competitive effects of the merger was made by the Commission. In the Southeast as a whole, the Commission found that the "overall reduction in rail competition will be relatively moderate." (320 I.C.C. at 166). In addition to the increasingly strong competition from other modes of transportation, such as the truck lines, water carriers, and pipelines, competition from other railroads will continue to exist at every major city in the area except Tampa (*id.* at 164).

In tacit recognition of the correctness of the Commission's appraisal of the competitive situation in the Southeast as a whole, appellants have concentrated their attack on the situation in Florida—an area

recognized by the Commission to be unique. The Commission observed (320 I.C.C. at 163) that in Florida "the merged company would have approximately 81 percent of the railway mileage in the State," and that "there is no question that there will be a significant reduction in rail competition in Florida." (320 I.C.C. at 166). The Commission took into account the fact that in the central and western portions of the State its approval of the merger would result in a rail monopoly. "The situation at Tampa and in the central and western portions of Florida is unique in that those areas are served by no other railroad except Seaboard and Coast Line." (320 I.C.C. at 164). "The rail monopoly that would result from the merger in portions of Florida" was specifically noted, and its "effects upon communities or the shipping public" appraised (320 I.C.C. at 165).

Appellants' attack upon the adequacy of the Commission's consideration of the competitive effects of the merger is, in reality, simply a continuation of their efforts to compel the Commission to utilize the "product and market" analysis of antitrust cases. Thus Southern alleges a "need to use quantitative terms in 'estimating the scope' of the curtailment of competition", and a requirement that the Commission "make some measurement—to say 'how much'" competition would be curtailed (So. J.S. 30-31). The City of Tampa goes even further, urging that the Commission be required to "circumscribe the geographic areas and sub-areas wherein the proposed

merger will affect competition"; to "delineate (a) the modes of transport competing therein and (b) the passengers and various commodities important therein and (c) for which commodities or types of commodity each mode successfully competes"; and, on the basis of this type of market and product analysis "articulate its estimate of the effects on 'competition'." (City J.S. 13-14). This is precisely the type of requirement which was imposed by the lower court in its initial opinion in this case—which was summarily reversed by this Court.

Contrary to appellants' assertions (Fla. J.S. 16-17, So. J.S. 28-38, City J.S. 14-16), the Commission's analysis of the competitive situation in Florida made full use of its specialized knowledge of railroad and transportation conditions and practices, as well as economic principles and antitrust objectives. The Commission evaluated the extent to which the Seaboard and Coast Line had actively competed in the past, noting that while the lines of the two railroads are generally in the same area, at only 38 out of 168 points in Florida do both actively solicit traffic through agency stations. "Thus the number of Florida points at which there has been no competition is about four times as great as the number of Florida points at which Seaboard and Coast Line have heretofore competed." (320 I.C.C. at 165). "Seaboard and Coast Line heretofore have had what might be described as an imperfect monopoly" in parts of Florida, "from which there have been no appreciable adverse competitive effects upon communities or the shipping public." (320 I.C.C. at 164-165).

As a matter of practical transportation knowledge, it must also be recognized that full *laissez faire* competition has long since disappeared in the railroad industry. Congress has specifically made it a matter of public policy that railroads need not compete in the pricing of their services,[3] and the conference method of rate-making is widespread. The pervasive regulatory power of the Commission provides a further "effective safeguard against the evils attending monopoly" (*McLean Trucking Co.* v. *United States*, *supra*, 321 U.S. at 85). These are matters either ignored or discounted by appellants—despite the fact that appellant Florida East Coast possesses a similar local rail monopoly in much of eastern Florida.

Furthermore, appellant's entire discussion of the resulting rail monopoly "in" central and western Florida is misleading, since as a practical matter most rail traffic consists of long-haul movements *between* Florida and other parts of the Nation. Thus the competitive effects of the Seaboard-Coast Line merger on Florida shippers and communities can be evaluated only in the context of the alternative rail routes to and from other areas. It was this aspect of the competitive situation with which the Commission was concerned when it imposed routing and gateway conditions which not only preserve existing rail competition on shipments moving to and from Florida, but will actually enhance the competitive position of such railroads as Southern.

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[3] Section 5a of the Interstate Commerce Act, 49 U.S.C. § 5b.

One of the major conditions imposed by the Commission would open the Jacksonville gateway to the Southern. Southern is presently precluded, by the refusal of Seaboard and Coast Line to participate in through routes and joint rates with it, from participating in much of the Florida traffic originated at Seaboard and Coast Line points. The Commission, as a condition to its approval of the merger, has required that the Jacksonville gateway be opened to Southern and its affiliates "as to all traffic moving through Jacksonville at rates no higher than those available through other gateways." (320 I.C.C. at 182). The Commission further awarded the Central of Georgia, a Southern subsidiary, trackage rights which will also provide it with a Jacksonville gateway. These conditions will considerably enhance Southern's ability to compete for traffic moving between Florida and northern points, and thus "will result in an increase rather than decrease in intramodal rail competition." (320 I.C.C. at 188).

Ignoring the fact that many of the traffic conditions requested by it were actually imposed by the Commission (320 I.C.C. at 180-188), Southern is here complaining of the Commission's conclusion that two of its requested conditions were unnecessary—a condition which would have required the Seaboard-Coast Line to transfer to Southern a direct line from Jacksonville to Tampa (the very line that Seaboard and Coast Line plan to use in their own Tampa service (Tr. 3575-76)) and a condition which would require the merged company to divest itself of the Coast Line's long-standing stock interest in the Louisville and Nashville Railroad.

Southern's major contention is that the Commission's denial of the requested transfer to it of a line into Tampa was predicated on an erroneous "standard based on the private interests of the railroads involved and disregarding the public interest" (So. J.S. 41). Such contention, however, completely ignores the basic reason given by the Commission for its denial of the requested condition—that the transfer of the line "would, to a large extent, require the dismemberment of the merged company's lines, interfere with the merged company's planned economies, and in general frustrate the overall objectives of the merger, all to the detriment of the public interest." The transfer would be "primarily for the benefit of [Southern]" (320 I.C.C. at 209-10), and "would deprive the merged company of substantial revenues" (320 I.C.C. at 187). Thus the Commission properly found that the requested transfer would not be justified.

Southern's further request that the merged company be required to divest itself of Coast Line's interest in the L & N was deemed by the Commission "not necessary in the public interest" (320 I.C.C. at 189). Although Coast Line has owned a substantial stock interest in L & N since 1902, the L & N has always "operated under separate management unhampered by any influence of Coast Line" (320 I.C.C. at 188), and will continue to do so after the merger.[4] The

[4] Although Southern alleges (So. J.S. 9, 43-46) that there has been and would be significant "favoritism" between the companies, this factual question was decided to the contrary by the Commission, and its finding sustained by the lower court.

L & N operates outside the competitive area of Seaboard and Coast Line, so that "competition between the Louisville and Nashville and its competitors is more likely to remain free from the influence of the merged company." (320 I.C.C. at 189). Of even greater significance is the fact (which Southern does not mention) that, by virtue of the extraordinary traffic conditions here imposed by the Commission, Southern will now be able to perform over its own lines virtually all service that the merged company could perform in connection with the L & N (320 I.C.C. at 189, 208-209), so that the anticompetitive results alleged by Southern (So. J.S. 45-46) are largely illusory. In this circumstance, the Commission properly found divestiture to be unnecessary.[5]

Finally, Southern and the City of Tampa allege (So. J.S. 38-40, City J.S. 16-17) that the record made in the Commission proceeding was inadequate on the issue of the competitive effects of the merger. This is simply another link in appellants' efforts to force this case into the mold of an antitrust proceeding. Thus the City of Tampa[6] contends that the rec-

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[5] Southern's assertion (So. J.S. 46, at fn. 30) that "there has been no court review of this issue" is unwarranted. The lower court specifically stated (Fla. J.S. 50a) that it had considered "all other arguments" raised by the parties, and concluded that the Commission "explained its reasoning and supported its application of that reasoning by substantial evidence."

[6] The City of Tampa, moreover, initially adopted a resolution *supporting* the Seaboard-Coast Line merger. Only after the initial judgment of the district court had been vacated by this Court and the proceeding remanded to the district

ord "does not even contain the data from which it [the Commission] could validly deduce all the relevant geographic and product markets and submarkets" (City J.S. 16). This type of product and market analysis has already been held by this Court to be inappropriate in a rail merger proceeding, and the fact that the record does not supply precise data as to such matters simply reflects the fact that the record was developed in the context of the "public interest" standards of the Interstate Commerce Act, rather than the standards of the antitrust laws. Furthermore, as the lower court noted (Fla. J.S. 38a), appellants had full opportunity to produce such evidence during the Commission proceeding; having failed to do so, they are in a poor position to complain now that the record is inadequate to support their contentions. See *Brotherhood of Maintenance of Way Employees* v. *United States*, *supra*, 221 F. Supp at 28.

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court for full review of the Commission's decision did the City appear in opposition to the proposed merger. Its change of heart was apparently motivated by the Coast Line's proposal to construct a line of railroad to serve a new central Florida port which would be competitive with Tampa—a matter which has nothing whatsoever to do with the proposed merger. See *Florida East Coast Ry.* v. *United States*, No. 715, O.T. 1966.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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